State Of Michigan
In the Supreme Court

In the matter of:

Estate of Robert D. Mardigian, Deceased
(a.k.a. Robert Douglas Mardigian, deceased)

Mark S. Papazian,
Petitioner-Appellee,
v.

Melissa Goldberg,
Respondent-Appellant, and

Susan V. Lucken and Nancy Varbedian,
Respondents-Appellants, and

Edward Mardigian, Grant Mardigian and Matthew Mardigian,
Respondents-Appellants.

Case No. 152655

COA Case No. 319023

Charlevoix County Probate Ct
Case No: 12-011738-DE
Case No. 12-011765-TV
Hon. Frederick R. Mulhauser

PETITIONER-APPELLEE MARK S. PAPAZIAN'S ANSWER TO RESPONDENTS' APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM

Petitioner-Appellee, Mark S. Papazian, agrees that the Respondents-Appellants' Application For Leave to Appeal relates to the Order entered by the Michigan Court of Appeals on October 8, 2015, reversing the November 6, 2013 Order entered by the Charlevoix County Probate Court.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

This case is about the validity of a decedent's will and trust; the question for the probate court was whether the decedent intended to disinherit his family (the Appellants) in favor of his friend (the Appellee), or whether his friend unduly influenced the decedent.

Under Michigan's probate statutes, the proper focus is on the intent of the testator. Michigan Rule of Professional Conduct 1.8(c) became relevant only because the testator's friend was the lawyer who drafted the estate documents.

The probate court refused to admit the documents to probate, relying on "public policy" reflected in MRPC 1.8(c).

The court of appeals reversed, finding that the facts raised a presumption that the attorney unduly influenced the decedent and that the attorney must be permitted to attempt to rebut the presumption at trial. "The framework adopted by the legislature attempts both to honor the actual intent of the grantor while also protecting against abuse . . . case law and existing statutes afford [the attorney] the opportunity to attempt to prove by competent evidence that the presumption of undue influence should be set aside."[1]

As the court of appeals properly held, resolution here requires more than simply applying "public policy" or acknowledging that courts can supervise attorney conduct.

IS REVIEW ADVISEABLE WHERE APPELLANTS BASE THEIR APPLICATION ON RULE 1.8(c) AND ITS PUBLIC POLICY, AND VIRTUALLY IGNORE THE LAST 100+ YEARS OF COMMON LAW, THE LEGISLATIVELY ENACTED PROBATE STATUTES, AND ALL OTHER COUNTERVAILING PUBLIC POLICIES?

The Appellants answer: **Yes**

The Appellee answers: **No**

[1] Ex 1, Court of Appeals' Opinion, p 8.

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> "The framework adopted by our Legislature attempts both to honor the actual intent of the grantor while also protecting against abuse. Because [Appellee Papazian] was the decedent's fiduciary, he benefited from the transaction with decedent, and as the drafter of the documents, he has an opportunity to influence the decedent's decision in that transaction, it is presumed he exerted undue influence in securing the devises at issue. However, case law and existing statutes afford [Papazian] the opportunity to prove by competent evidence that the presumption of undue influence should be set aside."[1]

INTRODUCTION

The Appellants articulate the issue here as whether Michigan Rule of Professional Conduct ("MRPC") 1.8(c)[2] requires voiding a bequest to the attorney who drafted the decedent's estate documents because the donee was not related to the decedent. This is not, however, the essential issue—the fulcrum of this case is the validity of a decedent's will and trust. The question for the probate court was whether the decedent intended to disinherit his family (the Appellants) in favor of his friend (the Appellee), or whether his friend unduly influenced the decedent. Under Michigan's statutory scheme, the proper focus in such a challenge is on the intent of the testator. The MRPCs only became relevant here because the testator's friend was the lawyer who drafted the estate documents.

Importantly, the instant case is not the first time that a Michigan lawyer has drafted estate documents containing a testamentary gift to the scrivener. For more than one hundred years, Michigan law has held that the existence of such a devise raises a simple

[1] Ex 1, October 8, 2015 Court of Appeals Opinion, p 8.

[2] "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."

presumption of undue influence. See, e g, *Donovan v Bromley,* 113 Mich 53, 54; 71 NW 523 (1897) (devise to decedent's attorney raises presumption of undue influence); *In re Hartlerode's Estate,* 183 Mich 51, 60; 148 NW 774 (1914) (identifying "certain cases in which the law indulges in the presumption that undue influence has been used" including where a client makes a will in favor of his lawyer); *In re Powers,* 375 Mich 150, 181; 134 NW2d 148 (1965) (dissent, noting "When the fiduciary benefited directly or indirectly happens to be a lawyer-scrivener of the challenged testament, the burden of overcoming the presumption quite obviously is substantially greater than had an independent and disinterested person prepared the testamentary instruments"); *Habersack v Rabaut,* 93 Mich App 300, 306; 287 NW2d 213 (1979) (presumption of undue influence where client makes a will in favor of his lawyer). This precedent and presumption, by which the attorney bears the burden of proving that the estate documents were free of undue influence, protects all the parties—it treats the estate documents with heightened suspicion while remaining open to the possibility that the documents actually reflect the decedent's intentions for the disposition of his property.

In the instant case, attorney Mark Papazian participated in re-drafting estate documents for his life-long best friend, Bobby Mardigian.[3] Years before Mr. Papazian ever touched any estate document for Bobby, Bobby had already disinherited his brother

[3] Appellants *assume* that this action constituted a violation of MRPC 1.8(c). Note that there has been no admission of any violation, and no finding by the Attorney Disciplinary Board or a panel of the Board of a violation. Appellants would grant an attorney *accused* of unethical conduct fewer rights than a criminal accused, who is presumed innocent until proven guilty.

and two nieces (Appellants Mardigian, Lucken and Varbedian) in multiple estate plans drafted by other lawyers.[4] Thereafter, in 2010 and 2011, Bobby asked Mr. Papazian to amend these documents to include additional devises to Mr. Papazian and his two children. Over the course of the six months (*after Mr. Papazian was involved in drafting the relevant estate documents*) Bobby consulted a new estate lawyer about making changes to these documents. The new lawyer admitted that Bobby did not make any changes to the estate documents drafted by Mr. Papazian, even after the new lawyer raised conflict-of-interest concerns about the Papazian-drafted documents. During this same time period, Bobby also reviewed his estate plan with Comerica's wealth planning professionals (including an attorney) and yet Bobby made no changes to it. The court of appeals correctly applied existing law, reversed the probate court and held that Mr. Papazian should be permitted to present his evidence to a jury in an effort to convince them that he did not unduly influence Bobby.

The Appellants suggest that this Court's promulgation in 1988 of the MRPCs changed the substantive law in Michigan to a bright-line rule providing that any estate document drafted in violation of Rule 1.8(c) must be voided. This is simply not true—the MRPCs actually *do not address* what probate courts are to do in this fact situation. However, the validity of estate documents has been dictated by Michigan statute for years. This fact did not change when the MRPCs were adopted: unlike some other states, Michigan has no statute declaring a bequest to an attorney-scrivener void.

[4] These and additional facts are included on a timeline, attached as Ex 2.

Contrary to the Appellants' arguments, the MRPCs do not and should not preempt all other sources of Michigan law. The MRPCs are intended to constitute standards for attorneys' conduct, and "[f]ailure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the attorney disciplinary process."[5] MRPC 1.9(b). "The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by the rule." *Id*. Indeed, as the Preamble comments to Rule 1.0 state, Michigan's ethical rules:

> are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. *Furthermore, the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons. . . nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty*.[6]

Despite this plain statement, Appellants seek to use MRPC 1.8(c) offensively, that is, to impermissibly build their civil case to obtain monies for themselves.

Appellants also argue that review is necessary to "clarify the supremacy of this Court's rulemaking power in this area." No clarification is needed. It is crystal clear under

[5] Pursuant to MCL § 600.904, this Court promulgated rules governing the discipline of Michigan attorneys, including both a prosecution arm (the Attorney Grievance Commission) MCR 9.108, and an adjudicative arm (the Attorney Discipline Board). MCR 9.110. The decisions of both entities are subject to this Court's review. What Appellants seek here is a ruling that would bypass this disciplinary system and preempt all countervailing common law and statutes, if a trial or probate court concludes that an attorney-litigant violated the MRPC.

[6] Emphasis added here and throughout this Answer unless otherwise indicated.

both the Michigan Constitution of 1963 [Art 6, §5] and Michigan statutes [MCL §600.904][7] that this Court is authorized to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members and "[a]s early as 1850, this Court recognized and exercised its power to regulate members of our state bar." *Schlossberg v State Bar Grievance Bd,* 388 Mich 389, 395; 200 NW2d 219 (1972).

To the extent that the Appellants argue that MRPC 1.8(c) and the MRPCs as a whole are indicative of Michigan's public policy, they are correct. Critically important, however, is the fact that the MRPCs are not the *only* source of Michigan public policy: Michigan's constitution, statutes, its common law and its administrative rules and regulations also constitute Michigan's public policy. *Terrien v Zwit*, 467 Mich 56, 67 n 11; 648 NW2d 602 (2002). These other sources of Michigan's public policy cannot and should not be jettisoned when they conflict with the public policy of the MRPC. Indeed, courts in other states that have examined the precise argument raised by Appellants here (i.e. the public policy of Rule 1.8(c) requires voiding gifts to attorney-scriveners) have expressly rejected this argument, in deference to the legislatively enacted probate schemes in their states. See e g, *Sanford v Metcalfe,* 110 Conn App 162, 168-170; 954 A2d 188 (2008); *Agee v Brown*, 73 So3d 882, 885-886 (Fla App 2011).

What Appellants seek here is a ruling that the MRPCs trump all other Michigan laws when a Michigan attorney is a litigant. Adopting such an approach would entirely

[7] This statute has been in its present form since at least 1981. See *Falk v State Bar of Michigan*, 411 Mich 63, 125, n 6; 305 NW2d 201, 221 (1981) (Levin, J., concurring) (quoting then-"present version" of statute, which is identical to the 2015 version).

eviscerate a decedent's testamentary intent; ignore Michigan's probate statutes; bypass the attorney disciplinary system established by this Court; establish dangerous precedent, and far exceed the permissible purposes of the MRPC. Review of the court of appeals' October 8, 2015 Order is not necessary or required.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. Underlying Facts

Bobby Mardigian died on January 12, 2012 at age 59, following a short fight with aggressive lung cancer. Bobby Mardigian and Mark Papazian, both of Armenian heritage, met when they were 24 and 18, respectively. Mr. Papazian considered Bobby "like family" and the feeling was mutual; Bobby often referred to Mr. Papazian as his "cousin" although there was no blood relationship between them.

Throughout his life, Bobby lived primarily on money received from others, including money given to him by Mr. Papazian. Bobby's older brother, Appellant Edward Mardigian, testified that Bobby was a "non-productive human being"[8] who drank, gambled, did drugs, and tended to exaggerate.[9] After Bobby's mother passed away in 2010, Bobby and Edward each received one-half of their mother's sizeable estate. A sister of Bobby and Edward predeceased their mother, and the sister's two daughters (Appellants Lucken and Varbedian, Bobby's nieces) received nothing from their grandmother's estate.

Bobby created, and changed, his estate plan several times. In his earliest estate plans

[8] Ex 3, Edward Mardigian Dep, 89:16-19; 90:1-2.

[9] Ex 3, Edward Mardigian Dep, 29:5-10.

(drafted in the early 1990s) he included testamentary gifts to family members. However, as rifts between Bobby and his family grew, Bobby disinherited his family. In fact, none of Bobby's estate documents drafted after 1995 included gifts to his brother Edward, or to his nieces. [Exhibits 4, 5, 6]. None of these estate documents were drafted by Mr. Papazian.

In 2007, Bobby first approached Mr. Papazian asking him to update his estate documents because Mark was his "best friend." Mr. Papazian eventually agreed to do so, and ultimately made the requested changes to both Bobby's Will and Trust in 2007, 2010 and on June 8, 2011. [Exhibits 7, 8, 9].

The estate documents at issue here are Bobby's June 8, 2011 Will [Ex 9] and his August 13, 2010 Trust [Ex 8]; Mr. Papazian drafted portions of each of them.

II. After Mark Papazian Drafted the Estate Documents, Bobby Consulted With Another Lawyer About His Estate Plan, But Made No Changes To It

Within weeks after Mr. Papazian completed work on Bobby's estate documents in June, 2011, Bobby contacted another attorney (Joseph Bonventre, of Clark Hill) and sent him copies of his Will and Trust for review.[10] When Mr. Bonventre learned that Bobby's friend Mr. Papazian had been involved in drafting Bobby's estate documents, Mr. Bonventre specifically raised with Bobby the possibility of a conflict of interest, but Bobby did not want Mr. Bonventre to spend time researching or pursuing that issue.[11] Bobby also

[10] Ex. 10, Bonventre Dep, 18:1-9; 21:13-15; 22:1-10.

[11] Ex. 10, Bonventre Dep, 31:2-18; 130:1-11; 131:12-132:1.

was adamant that he did not want Mr. Bonventre contacting Mr. Papazian directly to discuss updating any of the estate documents.[12] Despite the fact that Bobby retained a new lawyer for the purpose of considering changing his estate documents, Bobby never signed any new estate documents altering the documents drafted by Mr. Papazian.

III. After Mark Papazian Drafted the Estate Documents, Bobby Also Reviewed His Estate Plan with Two Comerica Bank Advisors, And Made No Changes To It

Comerica Bank managed Bobby's finances for several years prior to his death.[13] Four months after Mr. Papazian completed work on Bobby's estate documents, Bobby met with two Comerica employees: (1) a Trust and Estate Advisor (and attorney); and (2) a Wealth Planner to discuss his estate plan. On October 17, 2011, these Comerica employees emailed a 76-page "wealth plan" for Bobby to Bobby's then-estate attorney, Mr. Bonventre.[14] This "wealth plan" contained detailed discussion and a diagram showing that, if Bobby died in 2011, Mr. Papazian would receive in excess of seven million dollars, and that each of Mr. Papazian's children would receive net bequests of $5 million. Ex 12, Comerica October 17, 2011 "Wealth Plan" p 52.

IV. Bobby Died on January 12, 2012

On January 9, 2012 (more than six months after Mr. Papazian ceased all involvement with Bobby's estate documents), Mr. Bonventre emailed the Comerica Trust

[12] Ex. 10, Bonventre Dep, 57:3-19.

[13] Ex 11, [Comerica Trust and Estate advisor and attorney] K. Christ Dep, 143:2-13.

[14] Ex 12, Comerica October 17, 2011 "wealth plan" prepared for Bobby Mardigian.

and Estate Advisor stating that "based on my last call with Bob, he did not want to change anything until he thought about the issues further."[15]

Bobby died three days later, on January 12, 2012. Bobby had decided not to sign any of the documents that Mr. Bonventre prepared which would have amended or revoked Bobby's estate planning documents.[16]

V. Probate Court Proceedings

Almost immediately after Mr. Papazian filed Bobby's June 8, 2011 Will and Trust for probate in the Charlevoix County Probate Court, Bobby's estranged family members (and one of Bobby's girlfriends) filed objections challenging both: (1) the estate documents, and (2) Mr. Papazian serving as personal representative.

Bobby's brother Edward and his two sons (the Mardigian Appellants) filed Objections, asserting that: "The Alleged Last Will was the result of the fraud and *undue influence of Robert's attorney, Mark S. Papazian*."[17] Bobby's nieces (Appellants Lucken and Varbedian) also objected, claiming that: "Papazian as drafting attorney, naming himself and his wife as a fiduciary of the estate, and naming himself as a beneficiary under the Previously Executed Will, compromises his honesty and integrity and creates the

[15] Ex. 10, Bonventre Dep, 108:3-7.

[16] Ex. 10, Bonventre Dep, 109:1-7.

[17] Mardigian's March 5, 2012 Petition for Appointment of Special Fiduciary, p 6.

presumption of *undue influence and overreaching by Papazian*. . . ."[18] (Emphasis added). Bobby's sporadic girlfriend, Appellant Melissa Goldberg [Ryburn], also filed objections.

Following discovery, the Mardigian Appellants moved for MCR 2.116(C)(10) summary disposition, asking the Probate Court to "void any claim" by Mr. Papazian and his children under the Will and Trust,[19] because he violated MRPC 1.8(c), and enforcing the resultant estate documents would violate Michigan's public policy.

Mr. Papazian filed a cross-motion for summary disposition on his own claim that there was no evidence of undue influence, relying on extensive deposition admissions by the Appellants. Mr. Papazian argued therein that public policy was insufficient to support voiding the estate documents where the bequest was consistent with Bobby's testamentary intent, and the MRPCs, Michigan case law, and Michigan statutes contain no bar to enforcing estate documents that result from violation of MRPC 1.8(c).

The probate court conducted no examination of Mr. Papazian's evidence, and it declined to permit a jury to do so. The probate court never considered whether the Rule 1.8(c) exception for a client who is "*related* to the donee" could be applied here, where Michigan does not define "related" and other states that do, could consider Bobby and Mr.

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[18] Nieces' March 26, 2012 "Amended Petition to Admit", p 10.

[19] The Appellants did not ask the probate court to declare the estate documents *void ab initio*—they asked only that *portions* of the documents benefitting Mr. Papazian and his children be stricken, thereby allowing the Appellants to take under a residuary clause. This relief is inconsistent with the holdings of the cases on which they rely. See, e g, *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 58; 672 NW2d 884 (2003) ("We find that public policy voids the contract ab initio").

Papazian "related."[20] Instead, the court summarily ruled from the bench that it would refuse to "accept the Will and Trust prepared by the attorney that benefits himself and his family for the purposes of probate and eventual enforcement. * * * The court . . . makes that decision based on that being not permitted under the Rules of Professional Responsibility. And the Court would be disinclined to enforce such a document in the court of this state." [Nov 6, 2013 TR, 43:6-16].

The resulting Order, entered on November 11, 2013, barred Mr. Papazian and his children from presenting evidence at trial supporting their claims under the Will or Trust, and dismissed the petition to admit the documents into probate. [Ex. 13]. That same day, the Appellants reached a contingent settlement to split Bobby's estate among themselves (*which agreement did not include Mr. Papazian or his children*). Subject to the payment of administrative fees, Bobby's estate has been maintained intact pending resolution of this appeal and any remand order.

[20] See, e.g., N.D.R. Prof. Conduct 1.8(c), which is identical to Michigan's rule, but then adds: "For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client *maintains a close, familial relationship*." *In re Disciplinary Action Against Overboe*, 844 NW2d 851, 861 (ND 2014) (Emphasis added); *Attorney Grievance Com'n v Saridakis,* 402 Md 413; 936 A2d 886, 889 (Md 2007) (same sentence added to similar rule). The probate court here apparently assumed that "related" encompasses only a connection by blood or marriage. See Random House Webster's College Dictionary, defining "related" as "allied by kinship, marriage or common origin." See generally *In re Cabibi*, 922 So2d 490, 494-497, 2005-1217 (La 2006) (dismissing ethical charges against attorney whose paralegal-daughter drafted estate documents for one Mrs. Hirsch bequeathing a substantial gift to her father (the attorney), "given the long-standing, close personal relationship between the Cabibi and Hirsch families").

VI. The Mardigians File An Attorney Grievance

On the same day that the probate court's Order was entered (November 11, 2013) Mr. Papazian filed a claim of appeal as of right in the Michigan court of appeals on behalf of himself and his children. Five days later, on December 16, 2013, the Mardigians filed an attorney grievance against Mr. Papazian. That matter remains pending as of this date.

VII. The Court of Appeals' Reversal

On October 8, 2015 the court of appeals reversed the probate court's grant of summary disposition. The court held that Mr. Papazian should be permitted to present his evidence to a jury so that it could determine whether his actions constituted undue influence over Bobby. The court of appeal's Opinion contains four essential points:

(a) *In re Powers Estate*, 375 Mich 150, 156, 176, 179; 134 NW2d 148 (1965) expressly holds that a will devising the bulk of the estate to an unrelated attorney and his family is not thereby rendered invalid. Ex 1, Opinion, pp 3-4.

(b) Several cases decided after 1965 that refused to enforce *contracts* entered into by an attorney in violation of the MRPC are inapplicable to this dispute, because a *contract* is fundamentally different than a *will*, and different policy considerations apply to enforcement of a will. Ex 1, Opinion, pp 4-7.

(c) Michigan's statutory scheme dictates what a contestant must establish to invalidate a will or trust on the basis of undue influence. Ex 1, Opinion, pp 7-8.

(d) "The framework adopted by the legislature attempts both to honor the actual intent of the grantor while also protecting against abuse." Ex 1, Opinion, p 8. "[C]ase law and existing statutes afford [Mr. Papazian] the opportunity to attempt to prove by competent evidence that the presumption of undue influence should be set aside." *Id.*

Judge Servitto filed a dissenting Opinion.[21]

ARGUMENT

REVIEW IS NOT NECESSARY OR ADVISEABLE WHERE APPELLANTS BASE THEIR APPLICATION ON RULE 1.8(c) AND ITS PUBLIC POLICY, AND VIRTUALLY IGNORE THE LAST 100+ YEARS OF COMMON LAW, THE LEGISLATIVELY ENACTED PROBATE STATUTES, AND ALL OTHER COUNTERVAILING PUBLIC POLICIES

I. Michigan Already Has in Place A Procedure To Determine Whether A Will Drafted By An Attorney-Beneficiary Is Valid

This case is not the first time that disgruntled relatives have tried to attack the validity of a will by arguing that the attorney who drafted it included a bequest for himself. Michigan courts have consistently held that the proper inquiry in litigation over the validity of wills and trusts is whether there was undue influence by the attorney, not whether the attorney violated his ethical obligations. See, e g, *Donovan v Bromley,* 113 Mich 53, 54; 71 NW 523 (1897) (devise to decedent's attorney raises presumption of undue influence); *In re Hartlerode's Estate,* 183 Mich 51, 60; 148 NW 774 (1914) (identifying "certain cases in which the law indulges in the presumption that undue influence has been used" including where a client makes a will in favor of his lawyer); *In re Powers,* 375 Mich 150, 176, 81; 134 NW2d 148 (1965) (whether attorney who drew estate document "used questionable judgment" is *irrelevant* to enforceability of will; and dissent, noting the burden of

[21] Judge Servitto would affirm the dismissal on the grounds that the "Legislature delegated the determination of public policy the activities of the State Bar of Michigan to the judiciary"; "conduct that violates the attorney discipline rules set forth in the rules of professional conduct violates public policy"; and thus once an attorney acts contrary to the public policy set forth in the MRPC, the resulting instruments (here a Will and a Trust) are "no longer subject to dispute concerning intent." Ex 1, Opinion, Dissent, pp 2-3.

overcoming a presumption of undue influence where the beneficiary is the lawyer-scrivener). See also *Habersack v Rabaut*, 93 Mich App 300, 306; 287 NW2d 213 (1979) (presumption of undue influence where client makes a Will in favor of his lawyer). Despite the fact that this issue has been addressed repeatedly, Michigan legislature has not imposed a per se bar on enforcement of a testamentary gift to an unrelated attorney-scrivener.[22]

"The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." *In re Estate of Karmey*, 468 Mich 68, 74; 658 NW2d 796 (2003). Once a challenger satisfies these three prongs, the burden of proof shifts to the attorney-fiduciary to attempt to rebut this presumption and prove that the bequest in his favor does not result from his exercise of undue influence over the testator. See *In re Harrington*, 2000 WL 33421289, *4 (Mich App 2000) (fiduciary relationship "gave rise to the rebuttable presumption of undue influence")[Ex 14]; *In re Barnhart Estate*, 127 Mich App 381, 388-389; 339 NW2d 28 (1983) (attorney who created account with his client in

[22] This does not mean that Michigan tolerates an attorney exercising undue influence over a client. To the contrary, Michigan has long held that any testamentary document drafted by, and containing provisions benefitting, an attorney or other fiduciary, should be carefully scrutinized and looked upon with suspicion. See *Matter of Estate of Barnhart*, 127 Mich App 381, 388-389; 339 NW2d 28 (1983) ("an instrument drafted by an attorney in his own favor is looked upon with suspicion") citing *Creller v Baer*, 354 Mich 408; 93 NW2d 259 (1958). See also *Abrey v Duffield,* 149 Mich 248, 259; 112 NW 936 (1907) (because it has been recognized as contrary to the legal code of ethics for a lawyer to draft a will making dispositions of property in his favor, such dispositions are looked upon with suspicion).

which attorney retained right of survivorship, had burden of showing that he did not *unduly influence* his client); *Detroit Bank & Trust Co v Grout*, 95 Mich App 253, 272; 289 NW2d 898 (1980) ("presumption of undue influence [by fiduciary] was rebutted by a preponderance of the evidence"); *Vollbrecht's Estate v Pace,* 26 Mich App 430, 437; 182 NW2d 609 (1970) ("once the jury finds substantial benefit to the fiduciaries, or their interest, a presumption of undue influence will arise. Whether or not this presumption is rebutted, thereby becoming merely a permissible inference, is another question.").

This Court has specifically cautioned against assuming that a will leaving a substantial gift to the attorney-scrivener should automatically be voided. In *In re Powers Estate,* 375 Mich 150; 134 NW 2d 148 (1965), the female decedent asked the attorney-husband of a close friend to draw her will and the resulting will left most of the decedent's considerable estate to the friend and her lawyer-husband, while disinheriting the decedent's relatives. *Id.* at 156-157, 163. At trial over the will's validity, the jury returned a general verdict against the will, which this Court reversed and remanded for a new trial. Despite the appellees' strenuous protestations about the propriety of the attorney's actions, this Court made clear even on these facts that the appropriate issue was whether the attorney had unduly influenced the decedent. *Powers,* 375 Mich at 157-158. The Court directed that:

> The forum in which to test unprofessional conduct of an attorney in this State is adequately supplied in the State Bar grievance procedure. The forum in which <u>not</u> to test it is a jury trial determining testamentary capacity and undue influence. The purity of motive of the advocates representing those found to be proper parties in interest is not to be the subject of consideration. It is not in issue. [*Powers,* 375 Mich at 178]

Powers thus rests on an important assumption: that under certain factual circumstances, such a gift could be enforceable and not the result of undue influence. *Powers* is not dead letter law, and *In re Karabatian's Estate,* 17 Mich App 541; 170 NW2d 166 (1969) does not hold otherwise.[23]

II. The Validity of Wills and Trusts Is Statutory and Michigan's Legislature Has Chosen Not to Enact A Statute Voiding Gifts to an Attorney-Scrivener

A. Michigan's Probate Statutes Do Not Void Such Gifts

In Michigan, the state legislature is vested with the power to enact statutes governing the validity of wills and trusts as well as the rules of descent and distribution. *In re Blanchard's Estate*, 391 Mich 644, 664-65; 218 NW2d 37 (1974) (Michigan statutory scheme "sets forth certain definite requirements which must be complied with for a will to be valid. By setting forth these requirements, and by providing for revocation by law only

[23] There, a lawyer who was unrelated to the decedent drafted a will that included a bequest to himself. Thereafter, the decedent executed a new will, prepared by a second lawyer, which eliminated the bequests to the first lawyer. The first lawyer contested the new will. At the close of the lawyer-contestant's proof, the probate court granted a directed verdict against him. Thus, the *reason* that the lawyer got nothing was because the decedent validly changed his will to disinherit him, not because of any ethical impropriety by the lawyer. On appeal, the lawyer challenged the probate court's comments about the lawyer's ethics. *Id.* at 545-547. The appellate court defended the probate court's right to criticize the attorney, citing Michigan's long history of viewing such transactions with suspicion. *Karabatian,* 17 Mich App at 546, before summarily stating: "Apparently warnings do not suffice. If an attorney's conduct so violates the spirit of the lawyer's code of ethics, it also runs contrary to the public policy of this state. The bequest to contestant being void, he has no standing to contest the later will." *Karabatian,* 17 Mich at 546-547. This case does not hold that an estate document benefitting a non-family member scrivener attorney is void. Second, the quote is dicta (related to the ethical comments, not to the validity of the will). Third, if the quote could be construed in the manner espoused by Appellants, it would be directly inconsistent with the Supreme Court *Powers* case decided just four years earlier. This court of appeals decision did not and could not overrule *Powers.*

under certain circumstances, our Legislature sought to achieve a certain stability in the probate area of the law"). See also *Matter of Estate of Jurek*, 170 Mich App 778, 784-85; 428 NW2d 774 (1988), citing *Labine v Vincent,* 401 US 532; 91 SCt 1017; 28 LEd2d 288 (1971).

The legislature in some states has chosen to void testamentary gifts that benefit a non-family member scrivener attorney. See, for example, Vernon's Texas Code Ann, § 254.003(a) ("A devise of property in a will is void if the devise is made to: (1) an attorney who prepares or supervises the preparation of the will [and containing an exception in § 254.003(b) where attorney is related to the testator]"); Kan Stat Ann § 59-605 (testamentary provision "written or prepared for another person, that gives the writer or preparer or the writer's or preparer's parent, children, issue, sibling or spouse any devise or bequest is invalid" unless preparer related to testator or testator knew the contents and had independent legal advice relating thereto).

However, Michigan has no such statute. See *Abrey v Duffield,* 149 Mich 248, 259; 112 NW 936 (1907) (noting absence of any statute invalidating a bequest made to a scrivener of a will). The fact that the Michigan legislature has chosen *not* to enact a statute barring gifts to a non-family member scrivener is pivotal here because any holding voiding such a gift would disregard the statutory scheme established by the Michigan legislature.

B. Courts in Other States Have Refused To Impose Rule 1.8(c) "Public Policy" Exceptions Upon Their State's Legislatively Enacted Probate Schemes

Michigan courts are not the first to wrestle with whether the public policy reflected by Rule 1.8(c) is a sufficient basis to void a will drafted by an attorney in his own favor

when the attorney is not related to the decedent. This precise issue has been persuasively addressed in two out-of-state cases, both of which declined to use the public policy of Rule 1.8(c) to trump the legislatively enacted probate statutes in their state.

In *Agee v Brown*, 73 So3d 882, 884 (Fla App 2011), the trial court (like the probate court here) concluded that a testamentary gift to a lawyer was void as contrary to public policy based on Florida's version of Rule 1.8(c) because the decedent's lawyer drafted a will that left a substantial bequest to the lawyer and his wife. The lawyer appealed, and the appellate court reversed the public policy finding, noting that, "[t]he Florida Probate Code, however, does not provide for such an automatic exclusion [of the bequest]." *Agee*, 73 So3d at 885. "It is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature." *Agee*, 73 So3d at 885-886.

Likewise, the Connecticut Court of Appeals reached the same result rejecting the same "public policy based on Rule 1.8(c)" argument in *Sandford v Metcalfe,* 110 Conn App 162; 954 A2d 188 (2008), *cert denied*, 289 Conn 931 (2008). There, the decedent signed a handwritten will five days before her death leaving her estate to her lawyer (who had drafted it at the decedent's home) and her handyman; this will revoked a 38-year old will that would have benefited her heirs. The heirs challenged the new will, asserting undue influence and claiming that permitting the lawyer to take would violate public policy because the lawyer violated Rule 1.8(c). The court held that "[t]he law governing descent and distribution emanates from the legislature and is purely statutory. . . . [and there is] . . . no statute barring an attorney who drafted a testamentary instrument from inheriting by

the instrument she drafted." *Metcalfe,* 110 Conn App at 168-169. The appellate court therefore refused to usurp the Legislature's job to reach the conclusion urged by the heirs:

> Because there is no statute barring a distribution to Sanford, the heirs at law ask us to use our equitable powers to prevent such a distribution. We cannot do so. Even if the omission of such a statute were the result of legislative oversight or neglect, we have no power to supply the omission or to remedy the effect of the neglect. Any qualification [of the law of descent and distribution] pronounced by this court would be a judicial grafting of public policy restrictions on an explicit statutory provision. * * * The statutes cannot be changed by the court to make them conform to the court's conception of right and justice in a particular case. *To avoid trenching on legislative ground, the court must take the view that if the legislature had intended such an exception from the statutes as is sought in this case, it would have said so*. Although we agree that it is ill-advised, as a matter of public policy, for an attorney to draft a will in which she is to receive a bequest, in the absence of statutory provisions to the contrary, there is no bar against the right of Sandford to inherit from the decedent's estate under the statutes governing descent and distribution. If the law is to be changed to make provision for the situation at hand, it is for the legislature to make the change, not the court. [*Metcalfe*, 110 Conn App at 169-170 (Citations omitted)].

Similarly, in the instant dispute over the validity of Bobby's Will and Trust, this Court should not usurp the legislatively created Michigan Estates and Protected Individuals Code.[24]

III. The MRPCs Do Not Authorize Striking A Gift To a Lawyer-Scrivener

The Appellants do not address Michigan's common law or statutory jurisprudence. Instead they claim that the 1988 enactment of MRPC 1.8(c) permits Michigan courts to

[24] Michigan's Constitution, art 3, §2 recognizes that the powers of government are divided into three branches, and that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." "[T]he evil to be avoided [by this separation of powers] is the accumulation in one branch of the powers belonging to another." *People v Conat*, 238 Mich App 134, 146; 605 NW2d 49 (1999).

disregard both Michigan's Estates and Protected Individuals Code and the common law addressing undue influence by a fiduciary. The Appellants stridently assert that if an attorney does something that the MRPCs say he "shall not" do, then courts must act immediately to enforce the MRPC's prohibitions. This argument fails to withstand scrutiny.

A. The MRPCs Are Not Intended To Affect Civil Litigation

As a threshold matter, *MRPC 1.8(c) does not contain any provision authorizing the striking or voiding of any testamentary gift.* That is, although Rule 1.8(c) prohibits certain conduct as an ethical matter, it does not address what happens to the estate documents where an attorney does not comply with ethical rules. This omission is important and cannot be ignored.[25]

The MRPC are intended to guide attorney behavior, not to constitute building blocks for litigation. MRPC 1.0(b) states that, "[f]ailure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule." See also *Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000) ("though failure to comply with the requirements of MRPC 1.8(h) may provide a basis for invoking the disciplinary

[25] The rules of statutory construction apply to the provisions of the MRPC, *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 44-45; 672 NW2d 884 (2003), and when interpreting statutes, courts are to assume that an omission in a statute was intentionally made. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 135; 662 NW2d 758 (2003).

process, such failure does not give rise to a cause of action for enforcement of the rule or for damages caused by failure to comply with the rule.")

Even more directly, the Preamble comments to Rule 1.0 provide that "nothing in the rules should be deemed to *augment . . . the extradisciplinary consequences of violating such a duty.*") (Emphasis added). *See generally Johnson v QFD, Inc*, 292 Mich App 359, 365-366; 807 NW2d 719 (2011) (while "as a general matter . . . contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void . . . it does not necessarily follow that every statutory or regulatory violation by one of the contracting parties renders the parties' contract void and unenforceable.").

As Pennsylvania's intermediate appellate court persuasively reasoned in *In re Bloch*, 425 Pa Super 300, 310 n 8; 625 A2d 57, 63 (1993): "To the extent that the scrivener's conduct is challenged as unethical behavior violative of the Rules of Professional Conduct, Rule 1.8(c), our Supreme Court has held that enforcement of the Rules of Professional Conduct does not extend itself to allow courts to alter substantive law or to punish an attorney's misconduct." (Citation omitted).

B. The "Shall Not" Argument Is Unsupportable

Appellants argue that the "shall not" language of MRPC 1.8(c) provides a basis for courts to summarily enforce the Rules' prohibitions. The principal problem with this argument is that the MRPCs enumerate 54 different things that attorneys "shall not" do.[26]

[26] See MRPC 1.1; 1.2(c); 1.5(a); 1.5(d); 1.6(b); 1.7(a); 1.7(b); 1.8(a); 1.8(c); 1.8(d); 1.8(e); 1.8(f); 1.8(g); 1.8(h); 1.8(i); 1.8(j); 1.9(a); 1.9(b); 1.9(c); 1.10(a); 1.11(a); 1.11(c); 1.12(a); 1.12(b); 1.16(a); 2.2(c); 3.1; 3.3(a); 3.4; 3.5; 3.6(a); 3.7(a); 3.8(c); 4.1; 4.2; 4.3;

If the Appellants' "shall not" reasoning were to be accepted, then courts could be obligated to make summary determinations of all 54 MRPC violations, without the procedural safeguards currently in place in Michigan's Attorney Grievance process. See e g, Rule 1.1 ("lawyer *shall not* handle a legal matter without preparation adequate in the circumstances"); Rule 3.3(a)(1) ("lawyer *shall not* knowingly make a false statement of material fact or law to a tribunal"); Rule 3.4(d) ("lawyer *shall not* in pretrial procedure, make a frivolous discovery request"); Rule 3.5(d) ("lawyer *shall not* engage in undignified or discourteous conduct toward the tribunal"); Rule 4.1 ("lawyer *shall not* knowingly make a false statement of material fact or law to a third person [in the course of representing a client])"; Rule 4.4: ("lawyer *shall not* use means that have no substantial purpose other than to embarrass, delay, or burden a third person [in representing a client]").

The Appellants' interpretation would invite litigants to charge attorneys with ethical violations for the purpose of gaining strategic advantage, and would permit courts to use findings of violations to the detriment of an attorney on the merits of his or her case. The Appellants' interpretation of the "shall not" language cannot be adopted.

IV. Public Policy Reflected in the MRPCs Cannot Be Permitted to Trump Other Sources Of Michigan Public Policy

The Appellants argue that the public policy represented in the MRPC's prohibitions requires striking the testamentary gifts to Mr. Papazian. Once again, their argument fails

4.4; 5.4(a); 5.4(b); 5.4(c); 5.4(d); 5.5(a); 5.5(b); 5.6; 6.2; 6.3(a); 7.2(c); 7.3(a); 7.3(b); 7.5(a); 7.5(c); 8.1(a); 8.2(a).

to withstand scrutiny. To understand why, it is important to examine other recognized sources of Michigan public policy.

A. Other Relevant Sources Of Michigan Public Policy

Michigan courts are bound to follow the public policy pronouncements set forth in statutes adopted by the legislature. See, e.g., *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 131; 596 NW2d 208 (1999) ("Unquestionably, public policy pronouncements of the Michigan Legislature, enacted as statutes, are binding on this Court"); *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000) (same). Here, the Estates and Protected Individuals Code, MCL 700.1101 et seq., including the provision granting individuals the right to prepare a will (MCL 700.2501)), reflects the legislature's intent to grant Michiganders the right to leave their assets to whom they choose. See also MCL 700.1201(b), requiring the Code to be applied "to promote its underlying purposes and policies, which include . . . to discover and make effective a decedent's intent in the distribution of the decedent's property."[27]

It is therefore the public policy of Michigan, as recognized by the legislature, to effectuate a decedent's intent. See generally *In re Jauw*, 2012 WL 4039277, *3 (Mich App 2012), [Ex 15] quoting *In re Estate of Raymond*, 483 Mich 48, 58; 764 NW2d 1 (2009) ("Because a testator is free to dispose of his property as he sees fit, the intent of the testator is the '*guiding polar star*.'") (Emphasis added). "A fundamental precept which governs

[27] Similarly, one of the purposes of the Michigan Trust Code is to "foster certainty in the law so that settlers or trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust." MCL 700.8201(2)(c).

the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Kremlick Estate,* 417 Mich 237, 240; 331 NW2d 228 (1983). "It is incumbent upon a probate court to execute the intent of the testator regarding the distribution of the estate, especially where the intent has been expressed in the lawful provisions of a will." *Jauw*, 2012 WL 4039277 at *3, quoting *In re Howlett's Estate,* 275 Mich 596, 600–601; 267 NW 743 (1936).

The Appellants' argument that provisions in the MEPIC support their argument that enforcement of Bobby's Will and Trust would violate public policy, fails. MEPIC contains no provision that voids a will or trust which a judge believes was *created* in a manner that violates public policy. On the contrary, MCL 700.7410(1) permits termination of a trust only where the *purpose* of the trust is contrary to public policy. MCL 700.7404 permits a trust to be created where its *purposes* are not contrary to public policy.

To be crystal clear, there is nothing "unlawful" about Bobby's intent to leave most of his assets to his best friend and disinherit his family. Leaving money to a friend is not an unlawful *purpose*, such as creating a "playfield for white children" (*purpose* at issue in *La Fond v City of Detroit,* 357 Mich 362, 366; 98 NW2d 530 (1948)), or attempting to perpetuate individuals in office to the detriment of minority stockholders (*purpose* at issue in *Billings v Marshall Furnace Co*, 210 Mich 1, 5; 177 NW 22 (1920)). Here, the Appellants object to *who drafted* the estate documents—not to the lawfulness of the purpose at issue. The MEPIC does not support their argument.

B. Appellants Ask This Court To Ignore Other Sources Of Public Policy And Address This Case Using ONLY Public Policy Gleaned From the MRPCs

The Appellants do not address the public policy permitting a testator to leave his property to whom he wants, or the public policy requiring Michigan courts to enforce legislatively adopted statutes. Instead, they point to cases in which courts refused to enforce *attorney fee contracts* entered into between an attorney who violated one of the MRPCs (on one hand) and a client or another attorney (on the other hand).[28]

Each of these cases involved only the contractual expectations of the lawyer and the other party to the lawyer's contract. However, as the court of appeals in the instant case correctly held, public policy considerations supporting a *contract* differ from the public policy considerations supporting a *will*. Ex 1, Opinion, pp 4-7. "Whereas a contract is 'an agreement between parties for the doing or not doing of some particular thing and derives its binding force from the meeting of the minds of the parties,' a will is 'a unilateral disposition of property acquiring binding force only at the death of the testator and then from the fact that it is his or her last expressed purpose, and a will, although absolute and unconditional, cannot be termed a contract." Ex 1, Opinion, p 5 (citations omitted).

Therefore, according to the court of appeals:

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[28] See *Evans & Luptak, PC v Lizza,* 251 Mich App 187; 650 NW2d 364 (2002) (refusing to enforce agreement for referral fee from replacement counsel, after plaintiffs-attorneys withdrew due to conflict of interest); *Abrams v Susan Feldstein, PC,* 456 Mich 867; 569 NW2d 160 (1997) (remanding to address fee-splitting contract between two attorneys); *Morris & Doherty, PC v Lockwood,* 259 Mich App 38; 672 NW2d 884 (2003) (refusing to enforce referral fee contract between lawyer and inactive member of Bar); *Speicher v Columbia Twp Bd of Election Commissioners,* 299 Mich App 86, 92; 832 NW2d 392 (2012) (refusing to enforce for attorney fees that were grossly excessive).

> . . . there are valid policy reasons why our Supreme Court could reembrace the rule enunciated in *Powers* and conclude that it is appropriate to treat a trust or will, drafted in clear violation of the MRPC, differently than a contract drafted in violation of the MRPC would be treated. In the case of a contract deemed void as against public policy because it violates the MRPC, it is principally the drafting lawyer who suffers the consequence of the invalid contract. However, where a trust or will is deemed void as against public policy because the drafting attorney violated the MRPC, the invalidation of the bequest potentially fails to honor the actual and sincere desires of the grantor. [Ex 1, Opinion, pp 6-7].

C. This Court Is Not Free to Ignore Other Sources of Public Policy

In each of the four decisions on which Appellants rely, there were no countervailing public policies: the court was free to decline enforcement of the attorney-fee contracts. In contrast, here there are independent countervailing public policies that must be balanced against the public policy reflected in MRPC 1.8(c): (1) the right of a decedent to leave property to whomever she pleases, and (2) the court's obligation to enforce the statutes of Michigan.

Where a conflict between public policies exists, it cannot simply be assumed that application of one public policy always trumps all others—particularly where the policy that would be obviated is set forth by the state legislature:

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: "The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's."

Terrien v Zwit, 467 Mich 56, 67; 648 NW2d 602 (2002).

It is not the task of the judiciary to use public policy to preempt the statutory framework of our State. See *Buzzitta v Larizza Industries, Inc*, 641 NW2d 593, 594; 641

NW2d 593 (Mich 2002) ("This Court lacks authority to rewrite statutes to conform to our view of sound public policy. Indeed, we must apply statutory text even where we view the result as "absurd" or "unjust.") See also *Robertson v Daimlerchrysler Corp*, 456 Mich 732, 758; 641 NW2d 567 (2002) ("constitutional duty" of Michigan Courts "not to substitute our own policy preferences in order to make the law less 'illogical'"); *Terrien v Zwit*, 467 Mich 56, 66 n 9; 648 NW2d 602 (2002) ("The principle that contracts in contravention of public policy are not enforceable should be *applied with caution*.")[29]

D. Appellants' "Rulemaking Power" Argument Is Specious

Appellants ask this Court to review this case to "clarify the supremacy of this Court's rulemaking power in this area." No clarification is needed. MCL §600.904,[30] as enacted by Michigan's legislature provides that:

> The supreme court has the power to provide for the organization, government, and membership of the state bar of Michigan, and to adopt rules and regulations concerning the conduct and activities of the state bar of Michigan and its members, the schedule of membership dues therein, the discipline, suspension, and disbarment of its members for misconduct, and the investigation and examination of applicants for admission to the bar.

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[29] In addition, if this Court were to consider permitting the public policy of MRPC to preempt all other sources of public policy, it would cause unintended consequences. For example, refusing to enforce the terms of a will would grant a windfall to persons whom the testator did not intend to benefit. In the instant case, it would result in a windfall which the decedent specifically intended to prohibit.

[30] This statute is not new; it has been in its present form since at least 1981. See *Falk v State Bar of Michigan*, 411 Mich 63, 125, n 6; 305 NW2d 201, 221 (1981) (Levin, J., concurring) (quoting "present version" of statute, which is identical to the current version). See also *Schlossberg v State Bar Grievance Bd*, 388 Mich 389, 395; 200 NW2d 219 (1972) ("[a]s early as 1850, this Court recognized and exercised its power to regulate members of our state bar").

Pursuant to this statute (and the State constitution) this Court has promulgated rules governing the discipline of Michigan attorneys, including both a prosecution arm (the Attorney Grievance Commission) MCR 9.108, and an adjudicative arm (the Attorney Discipline Board). MCR 9.110. The decisions of both entities are subject to this Court's review. See *Butcher v Michigan Supreme Court*, 2008 WL 2067028, at *3 (ED Mich May 15, 2008) [Ex 16].

What Appellants ostensibly seek here, however, is "clarification" that by this Court's enactment of the MRPCs, it intended to establish a procedure to bypass the entire attorney-disciplinary system and preempt all other laws in Michigan, in the event that a trial or probate court concludes that an attorney-litigant violated the MRPC. Such a result would be far outside the recognized limits of this Court's authority. See *People v Glass*, 464 Mich 266, 281; 627 NW2d 261 (2001), quoting *McDougall v Schanz,* 461 Mich 15, 26; 597 NW2d 148 (1999) ("However, this Court's constitutional rulemaking authority extends only to matters of practice and procedure: *[t]his Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law*.")

CONCLUSION AND RELIEF REQUESTED

The court of appeals appropriately refused the Appellants' invitation to void a testamentary document drafted in disregard of MRPC 1.8(c). MRPC 1.8(c) contains no provision requiring this result. Michigan's legislature, likewise, has never adopted a statute voiding such a document (despite the fact that attorney-scrivener beneficiaries have been repeatedly addressed in Michigan decisions for more than one hundred years). *In re Powers Estate,* 375 Mich 150; 134 NW 2d 148 (1965) makes clear that the appropriate

issue in a civil suit over the validity of the will is whether the attorney-scrivener unduly influenced the decedent; the ethical propriety of such activity is a matter for the disciplinary system.

The court of appeals' determination that Mark Papazian should have the opportunity to rebut the presumption of undue influence is consistent with more than one hundred years of Michigan law, which should not be set aside or ignored based on a perceived new public policy. There is no basis for peremptory reversal.

Appellee Mark Papazian respectfully asks this Court to deny the Appellants' Application for Leave to Appeal.

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